IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
(Wheeling Division)

CHARLES C. CUMPTAN, and DEBORAH V. CUMPTAN	* * *	
Plaintiffs,	* *	
vs.	* *	CIVIL ACTION NO.: 5:10-CV-012
ALLSTATE INSURANCE COMPANY and LARRY D. POYNTER, individually, and ED STEEN, individually	* * * * *	
Defendants.	*	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS LARRY D. POYNTER AND ED STEEN'S AMENDED MOTION TO DISMISS

Now come the Plaintiffs, Charles C. Cumptan and Deborah V. Cumptan, by and through their counsel, and submits the following memorandum in opposition to Defendants Larry D. Poynterôs and Ed Steenôs Motion to Dismiss. For the reasons set forth herein, Plaintiffs respectfully request that the Motion to Dismiss filed by Larry D. Poynter and Ed Steen [hereinafter collectively, ñdefendantsò] be denied.

FACTUAL BACKGROUND

Defendants are claim adjusters and/or managers employed by the Defendant Allstate Insurance Company [hereinafter, ñAllstateò] who were under an affirmative legal duty to disclose all possible underinsured motorist coverage available under the Allstate policy of insurance purchased by Charles C. Cumptan and Deborah V. Cumptan [hereinafter ñthe Cumptansò] to compensate them for the severe and permanent injuries they suffered as a result of the negligence of an underinsured driver. *See e.g.* W. Va. Code §33-11-4(9)(n); 114 W.Va. C.S.R. 14-4.1. Instead, defendants conspired with Allstate to actively and fraudulently conceal the availability of stacked underinsured motorist coverage benefits to which the Cumptans was entitled in violation of West Virginia law. *See*, 114 W.Va. C.S.R. 14-4.2 (ñNo person may knowingly conceal from first-party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.ò). At the same time that the defendants and Allstate were refusing to stack the Cumptansô policy limits, Allstate was seeking a premium rate increase by representing to the West Virginia Insurance Commissioner that it was actively paying such stacked claims because its policies did not contain legally sufficient anti-stacking language. Upon learning of the defendantsô and Allstateôs deceit during the handling of their claim, the Cumptans promptly sought relief in the Circuit Court of Marshall County, West Virginia, a venue where similar claims were pending.

Allstate removed the Cumptansô claims to this Court arguing that the defendants were fraudulently joined because any claim against the defendants would be barred by the applicable statute of limitations and the ñtwo dismissal ruleò.[1] The defendants now seek to dismiss The Cumptansô claims. The basic premise of defendantsô argument is that that the Cumptans ñshould have knownò their policy did not preclude the stacking of underinsured motorists limits at the time they agreed to accept Allstateôs $100,000.00 offer of the full available policy limits. Defendantsô argument in this regard ignores the critical fact that they were legally required to disclose *and not conceal* the full amount of underinsured motorist coverage available. Contrary to the suggestion implied in defendantsô argument, the Cumptansô claims in this action arise not from the injuries they

[1] As explained more fully in plaintiffsô Motion to Remand filed simultaneously herewith, Allstateôs removal of this action was improper and the matter should be remanded to the Circuit Court of Marshall County, West Virginia for further proceedings.

received at the hands of an underinsured tortfeasor, but from the discovery of defendantsô illegal conduct in the handling of their claim for benefits. Moreover, defendantsô arguments are particularly specious in light of the West Virginia Supreme Court of Appeals recent opinion in *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009), wherein the West Virginia Supreme Court clarified West Virginia law on the tolling of statutes of limitation by application of the discovery rule and/or a defendantôs fraudulent concealment of a cause of action and the impact of civil conspiracy allegations. In syllabus point 5 of *Dunn*, the West Virginia Court specifically held that questions of whether a statute of limitations has been tolled either by application of the discovery rule or the defendantôs fraudulent concealment of facts are generally ñquestions of material fact that will need to be resolved by the trier of fact.ò Thus, under the law of the State of West Virginia, defendantsô motion to dismiss should be denied and this matter remanded to the Circuit Court of Marshall County, West Virginia.

The Cumptans, residents of Lawrence County, Ohio, instituted this civil action against the Adjuster defendants, both residents of Cabell County, West Virginia, and Allstate, a resident of the State of Illinois for diversity jurisdiction purposes, in the Circuit Court of Marshall County, West Virginia, on or about January 11, 2010, after learning of the conspiracy carried out by Allstate and the Adjuster defendants to defraud Allstate policyholders of benefits to which they were legally entitled. *See*, Complaint, ¶¶ 1-5, 12, 14, 16, 18, 22-25. The Cumptans received serious and permanent injuries in a motor vehicle accident caused by an underinsured motorist, Melissa Cochenour, on May 27, 1988. Complaint ¶¶ 6-7. At that time, the Cumptans were insured under a policy of insurance issued by Allstate which provided $100,000.00 per person/$300,000.00 per occurrence underinsured motorist coverage benefits on each of three separate vehicles. Complaint ¶10. Despite knowledge that the three limits may be stacked, defendants represented to the

Cumptans that the total amount available under their policy to compensate their claims was $100,000.00, thereby fraudulently concealing the true policy benefits available to them. Complaint ¶¶ 12-15; Exhibit A to Complaint at BD-28 to BD-29, (ñexposure is $300,000.00 as 3 vehicles on policyò ñthere is $100,000.00 x # of veh. on policyò). Defendants made this representation despite Allstateõs attempt to obtain a premium increase by informing (or misinforming as the case may be) the West Virginia Insurance Commissioner that its policies issued before December 16, 1991, as the Cumptansô was, did not contain legally sufficient anti-stacking claims and that it was actively paying such stacked claims. Complaint, ¶¶ 12-14. As a result of the defendantsô acts and representations aimed at concealing the Cumptansô ability to stack their underinsured motorist coverage benefits to satisfy their claim, the Cumptans ultimately accepted the non-stacked underinsured motorist policy limits of $100,000.00 as compensation for their injuries. Complaint ¶ 16.

In May 2009, the Cumptans learned of a conspiracy between Allstate and certain of its individual adjusters, including the defendants, to deprive Allstate policyholders of their rightful policy benefits. This illegal scheme, the Cumptans learned, was uncovered in a lawsuit filed by Cindy Jo Falls in the Circuit Court of Marshall County, West Virginia, being Civil Action No. 00-C-200M, on September 25, 2000, against Allstate and defendant Larry Poynter. It was discovered in the *Falls* litigation that Allstateõs internal position was that the language contained in its policies issued before December 16, 1991, was insufficient to preclude stacking of uninsured and underinsured motorist coverages. Despite their knowledge and affirmative duty to disclose that Allstateõs policy did not preclude stacking, Allstate and the defendants actively represented to claimants, such as the Cumptans, that stacking was prohibited and actively sought to preclude stacking.

Upon learning of this illegal scheme, the Cumptans retained the counsel involved in the *Falls* litigation to pursue claims against Allstate and the defendants on their behalf. The concerted efforts of the defendants and Allstate to conceal their illegal conduct, fraud and misrepresentations are set forth in the Complaint. The Complaint specifically alleges that the defendants and Allstate ñengaged in an intentional effort to concealò benefits, ñacted with specific knowledge and intent to defraudò, and willfully, knowingly and maliciously concealed benefits from the Cumptans and otherôs similarly situated in violation of West Virginia law. Complaint ¶¶ 22-24. Not only do the Cumptans seek recovery of the remaining policy benefits which were wrongfully denied them, but they seek both compensatory and punitive damages arising from the defendantsô and Allstateôs illegal and fraudulent conduct of which they first learned in May 2009. Upon being served with the Complaint, Allstate removed the Cumptansô claims to this Court. Defendants now seeks to dismiss plaintiffs claims in their entirety based upon the ñtwo dismissal ruleò, statute of limitation grounds, and the failure to state a claim.

STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss should be granted only in ñvery limited circumstances.ò *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). Dismissal is appropriate pursuant to Rule 12(b)(6) only if ñ óit appears to be a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim.ô ò *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 143-144 (4th Cir. 1990) (quoting *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969)). Thus, when reviewing a motion to dismiss, a court must ñaccept as true all well-pleaded allegations and must construe factual allegations in the light most favorable to the plaintiff.ò *Randall v. United States*, 30 F.3d 518 (4th Cir. 1994) (citation omitted).

ARGUMENT

I. THE "TWO-DISMISSAL RULE" DOES NOT BAR PLAINTIFFS' CLAIM

Defendantsô invocation of the ñTwo-Dismissal Ruleò demonstrates a fundamental misunderstanding of the claims asserted in the instant action and further misrepresents the premise of the ñfirst suitò upon which defendants rely. As demonstrated by the complaint attached as Exhibit ñCò to Allstateôs Amended Motion to Dismiss, the ñcoverageò issue raised in the ñfirst suitò (the 1990 personal injury litigation) involved whether Allstate was entitled to an ñoffsetò for the monies paid in settlement by the tortfeasorôs insurer. The complaint in the 1990 litigation raises no issue regarding stacking of underinsured motorist coverages nor have defendants demonstrated that the stacking issue was litigated in that action, much less the issue in this case of willful concealment of coverage in subjective bad faith. The previously missing page 5 of the 1990 complaint, which formed the basis this Courtôs grant of leave to defendants to file their Amended Motion to Dismiss, demonstrates that the issue of ñstackingò was not raised in the prior action. In fact, the missing page 5 discusses only one $100,000 limit. As demonstrated by the dismissal order entered in the 1990 litigation also attached as a part of Exhibit C to defendantsô Amended Motion, the claims asserted against Allstate in the 1990 litigation were settled and dismissed by agreement of the parties. As the Second Circuit Court of Appeals has held a dismissal ñknowingly consented to by all parties does not activate the ótwo dismissalô bar against bringing an action based on or including the same claim.ò *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1018 (2nd Cir. 1976Under the Second Circuitôs holding in *Poloron*, an analysis of the ñtwo dismissal ruleò should not even be triggered because it is inapplicable on its face.

However, even if defendantsô argument triggers an analysis under ñtwo dismissal ruleò, the ñtwo dismissal ruleò does not bar the instant action. Unlike the 1990 litigation, the current litigation does not seek a determination of unsettled issues of available coverage. The 2009 lawsuit filed in the Circuit Court of Marshall County, which was voluntarily dismissed, did not seek to resolve unsettled issues of coverage but sought relief for Allstateøs and the defendantøs illegal conduct and intentional deception. Likewise, the instant action does not seek to determine a coverage issue because the question of the available coverage has been admitted by Allstate and the defendants in internal documents which recognize that the Cumptans were entitled to stacked underinsured motorist coverage limits. The instant action seeks relief for Allstate and the Adjuster Defendantøs illegal conduct and intentional deception regarding the availability of stacked underinsured motorist coverage limits to satisfy the Cumptansô claims.

As noted by defendants, the ñtwo-dismissal ruleò involves re-filing of the ñsame claim.ò *Manning v. South Carolina Dept. of Highway and Pub. Transp.*, 914 F.2d 44, 47 (4th Cir. 1990). Allstate maintains that the 1990 personal injury litigation asserts the ñsame claimò as the instant litigation. To accept this argument would require an extremely liberal factual interpretation of the claim asserted in 1990 (recovery for injuries sustained and a determination as to whether the policy permitted an ñoff-setò for amounts recovered from the tortfeasor) and the claims asserted herein (damages arising from defendantsô illegal conduct and fraudulent misrepresentations). Such liberal construction is contrary to the Courtøs standard of review for a Motion to Dismiss which requires all issues of fact and law to be resolved in plaintiffsô favor. *See, Randall v. United States*, 30 F.3d 518 (4th Cir. 1994). Simply put, the 1990 litigation involved questions of offset and the extent of the Cumptansô injuries. The Adjuster Defendants were not even involved in the 1990 litigation nor was their conduct at issue therein. The 2009 action filed in the Circuit Court of Marshall County involved issues identical to those presented in the instant lawsuit. The instant lawsuit involves claims of common law bad faith, violation of the West Virginia Unfair Trade Practices Act and attendant regulations, and fraudulent misrepresentations. The claims in the 2009 lawsuit and the instant litigation are not the same as nor based upon the allegations contained in the 1990 lawsuit. Accordingly, the ñtwo dismissal ruleò does not apply to preclude the instant action.

II. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE CUMPTANS' CLAIMS WERE TIMELY FILED UNDER WEST VIRGINIA LAW

Defendants primarily rely upon an argument that the Cumptansô claims are barred by the applicable statutes of limitation in support of their motion to dismiss. Although defendants cite to *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009), for its recitation of syllabus point 4 of *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), their decision to ignore the core of the *Dunn* opinion is telling because to apply *Dunn* would result in the failure of the defendantsô motion to dismiss. In *Dunn*, the West Virginia Supreme Court of Appeals clarified when statutes of limitation are tolled either through application of the discovery rule or a defendantôs misconduct in fraudulently concealing facts necessary for a plaintiff to discovery or pursue a cause of action. In either case, the West Virginia Court indicated the matter is generally not suited for summary resolution due to questions of material fact which must be resolved by the trier of fact. *Id*. at Syl. Pt. 5.

The *Dunn* Court set specifically set forth a five-step analysis to determine whether a cause of action is time-barred, holding that:

> A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action.

> Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Syl. pt. 5, *Dunn*. Application of this five step analysis demonstrates that a Rule 12(b)(6) dismissal the Cumptansô claims on statute of limitations grounds would be inappropriate.

Step 1 - Determination of Applicable Statute of Limitation

The Cumptans do not dispute that a one year statute of limitation applies to their Unfair Trade Practices Act and common law bad faith claims nor do they dispute that a two-year statute of limitations applies to fraud claims. What the Cumptans do dispute is when those statutes of limitation began to run.

Step 2 – When did the requisite elements of the cause of action occur

Defendants focus upon the date of the underlying automobile accident, May 27, 1988.[2] Defendants assume and, in turn, want this Court to assume, that all requisite elements must have occurred prior to the settlement of The Cumptansô claim for the ñnon-stackedò policy limits of $100,000.00. ñObviously,ò[3] according to the defendants, ñthis [ñthisò presumably meaning the occurrence of the requisite elements of each cause of action] would have happened well within the applicable one- and two-year limititations periods.ò Defendantsô brief, p. 5. When the requisite elements of each cause of action occurred is not ñobviouslyò as the defendants represent, particularly in light of the fact that each cause of action asserted by the Cumptans has, at its heart, the defendantsô concealment of their illegal conduct. The Court in *Dunn* recognized that this inquiry generally involves mixed questions of fact and law which require resolution of genuine issues of material fact by the trier of fact. *Dunn*, 689 S.E.2d at 265. The allegations at paragraphs 12, 14-17, 22 and 24 of the Complaint establish a *prima facie* case that the discovery rule applies.

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[2] Indeed, the whole premise of defendantsô argument on the triggering of the statute of limitation is contained on page 4 of their brief where they state ñit is clear . . . relating to the Adjuster Defendantsô handling of a claim arising from a 1988 accident ï that all the limitations periods would have run long ago.ò Further, defendants state the Cumptans ñclearly knew or should have known that they had been injured and who supposedly caused that alleged injury when their claim was fully and finally settled for the ónon-stackedô UIM coverage amount of $100,000.00.ò Defendantsô Brief, p. 5.

[3] Essentially, defendants offer this adverb in lieu of meeting their burden under Rule 12.

Step 3 – Determination of whether the discovery rule applies

ñThe ódiscovery ruleô is generally applicable to all torts, unless there is a clear statutory prohibition to its application.ò Syl. pt. 2, *Dunn*. Defendants have not demonstrated that a statutory bar exists to application of the discovery rule to any claim asserted by the Cumptans. Thus, the rule may be applied to toll the running of the applicable statutes of limitation until such time as the Cumptans knew, or should have known by the exercise of reasonable diligence, that (1) they had been injured, (2) the identity of the entity who owed them a duty to act with due care and who may breached that duty, and (3) that the conduct of that entity has a causal relationship to their injury. Syl. pt. 4, *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). In syllabus point 4 of *Dunn*, the Court explained:

> Under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff ñknows ofò or ñdiscoveredò a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

The relevant inquiry is when the Cumptans *objectively* had, or by the exercise of reasonable diligence, should have had knowledge that Allstate had acknowledged internally that they were entitled to $300,000.00 in coverage because its policy language was legally insufficient to preclude stacking of underinsured motorists coverages and that the defendants acted inconsistently with that position in the handling of their claim when they represented that their policy precluded stacking. Those facts form the basis of the Cumptansô claims. Defendantsô argument that the Cumptans are charged with knowing the law and, since they possessed a copy of their insurance policy, should have known it did not preclude stacking is misplaced and are yet another attempt to avoid their legal obligations. West Virginia law imposes a duty on insurers and insurance adjusters, like the defendants, to disclose all applicable policy provisions to first-party claimants and not conceal pertinent policy provision. 114 W.Va.C.S.R. 14-4.1, -4.2. Under defendantsô argument, the Cumptans are also presumed to know this law and may not assume their insurer and its agents were acting in accordance with the law when handling their claim. Such a construction would render the protections of 114 W.Va. C.S.R. 14-4.1 and 114 W.Va. C.S.R. 14-4.2 meaningless.

The insurance industry is a highly regulated industry with specific, heightened duties due to the trust and confidence which policyholders must place in their insurers. While defendants are correct that under *Hartley Hill Hunt Club v. County Commission of Richie County*, 220 W.Va. 382, 647, S.E.2d 818 (2007), all persons are presumed to know statutory law, West Virginia does not presume that insureds know the contents of their insurance policies. *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477, 491, 509 S.E.2d 1, 15 n. 14 (1998). Still less are they aware of their insurerôs internal positions on the scope of policy coverage. To accept defendantsô argument requires that this Court presume that the Cumptans knew the contents of their policy, were able to interpret the language contained therein in light of West Virginia common law and knew that the defendants were violating their legal duty to disclose and not conceal pertinent policy provisions. Further, defendantsô argument that the Cumptans ñshould have knownò that their policy language was legally insufficient to preclude stacking under West Virginia common law is particularly specious is the face of defendantsô statement in footnote six on page 8 of their brief that they ñdispute that these cases required óstackingô under the circumstances of plaintiffsô case.ò Defendants cannot have it both ways. Defendants cannot be permitted to argue that the Cumptans should have known that their policy provisions were insufficient under West Virginia case law to preclude stacking of their underinsured motorist coverage in an effort to bar their claims herein on statute of limitation grounds *while at the same time disputing that those same cases* required stacking.

Defendantsô arguments notwithstanding, the relevant date for statute of limitation purposes is the date on which the Cumptans learned of the conspiracy between defendants and Allstate to illegally and fraudulently conceal Allstateôs internal position that its policy language was legally insufficient to preclude stacking of uninsured and underinsured motorist coverage benefits in an effort to deprive policyholders, like themselves, of their rightful benefits. It was not until the Cumptans learned of this conspiracy that they learned the defendants had violated West Virginia law in the handling of their claim for underinsured motorist benefits by actions including, but not limited to: (1) concealing the fact that Allstateôs internal position was that its policy language was legally insufficient to preclude stating of underinsured motorists limits; (2) concealing the fact that they admitted in Allstateôs claim file that the Cumptans were entitled to $300,000.00 in coverage; (3) concealing the fact that Allstate had represented (or misrepresented) to regulatory authorities that it permitted its policyholders to stack uninsured and underinsured policy limits; (4) actively representing that to the Cumptans that their policy of insurance precluded the stacking of underinsured motorist coverages; and (5) compelling the Cumptans to ñsettleò for ñpolicy limitsò of $100,000.00 when they knew that Allstateôs internal position was that the policy limits were $300,000.00. To the extent that there is a dispute over when the Cumptans learned of defendantsô violation of Allstateôs internal position on stacking and the defendantsô violation of West Virginia law by concealing that Allstateés knew its policy permitted stacking, that is a question of fact which must be resolved by the trier of fact. *See* syl. pt. 5. *Dunn*. Such a determination is patently ill-suited to a Rule 12, on the pleadings, analysis. *LaPosta Oldsmobile, Inc. v. General Motors Corp.*, 426 F.Supp.2d 346, 349 (N.D.W.Va. 2006) (noting that a Rule 12(b)(6) motion ñis not a procedure for resolving a contest about the facts.ò).

Step 4 - Determination of whether doctrine of fraudulent concealment applies

Even if the trier of fact determines that the Cumptans are not entitled to the benefit of the discovery rule, then the trier of fact must determined whether the doctrine of fraudulent concealment applies to toll the statute of limitations. ñWhenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitations is tolled.ò Syl. pt. 5, in part, *Dunn*. ñFraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud.ò *Dunn,* 689 S.E.2d at 264 (quoting *Trafalgar House Const. Inc. v. ZMM, Inc.*, 211 W.Va. 578, 584, 567 S.E.2d 294, 300 (2002)). That is the precise situation before this Court. Defendants had specific knowledge or the means to know Allstateés own position that the language in the Cumptansô policy was insufficient to preclude stacking under West Virginia law, a duty under West Virginia law to disclose to them that $300,000.00 was available to satisfy their claims under the terms of their policy and an intent to mislead the Cumptans and fraudulently deprive them of the full policy proceeds to which they were legally entitled. The fact concealed ï Allstateés knowledge that stacking was required under the Cumptansôs policy language, is the critical fact forming the basis of all of the Cumptansô claims. Upon discovery of that fact, the Cumptans learned that the defendants had intentionally violated West Virginia law in the handling of their claim and unlawfully deprived them of their full policy benefits.

Defendants cite to several cases for the proposition that the doctrine of fraudulent concealment is inapplicable to toll the statute of limitations where the alleged fact concealed is the terms of a contract. Defendantsô argument in this regard is misplaced for two reasons. First, the argument oversimplifies the basis of the Cumptansô claims. Defendantsô argument conveniently omits that the Cumptans are alleging not only that the defendantsô and Allstate fraudulently concealed the true terms of their policy, but also fraudulently concealed their knowledge that the policy required stacking and their actions in denying the same are inconsistent with Allstateôs representations to the West Virginia Insurance Commissioner. Secondly, the cases relied upon by defendants are easily distinguishable.

For example, in *Skinner v. USAble Life Co.*, 200 F.Supp.2d 626 (S.D.Miss. 2001), the court noted that the plaintiffs were provided with the ñpolicies, certificates of insurance and brochures which clearly explained the method of disability paymentsò prior to or at the time they purchased the disability policies at issue. *Skinner*, 200 F.Supp.2d at 638. The court in *Skinner* noted that the defendant had ñpresented uncontroverted proof that [plaintiffs] had in their possession a certificate of insurance and a brochure which defined the scope of coverage and detailed deduction for óother incomeô at the time the disability policies were purchased[.]ò and found that the brochures were ñsufficiently clear concerning the policies to defeat any claim of fraudulent concealment.ò The essence of the claims asserted in *Skinner* was that the policy didnôt provide the benefits as they were represented to be at the time the policy was purchased. Here, the defendants have produced no evidence that the Cumptans were provided with any documentation which clearly indicated that their underinsured motorists coverages could be stacked contrary to the express representations of Allstate and the defendants during the handling of their claim that stacking was prohibited under their policy. Although Allstate knew internally stacking was required, on the fact of the policy, the issue was far less clear.

Similarly, defendantsô citation to the unreported opinion in *Raucci v. Roman*, 2008 WL 2622776 (D.Conn. July 26, 2008), actually contradicts their attempt to dismiss the Cumptansô claims upon a Rule 12(b)(6) motion. The court in *Raucci*, specifically noted that a statute of limitations defense ñgenerally requires a factual inquiry beyond the face of the complaint.ò *Raucci*, 2008 WL 2622776, *2. *Raucci* involved the sale of the plaintiffsô interests in certain corporations. The court found plaintiffôs argument that the defendant had fraudulently concealed contract terms from them was insufficient to invoke the doctrine of fraudulent concealment to toll the stature of limitations which, based on the face of the Complaint would appear to bar the action, where the plaintiff actually signed the contract at issue and there was no allegation that the term was unknowable to them. Citation to a case regarding fraudulent concealment of a term of a negotiated business contract simply has not relevance to an insurance dispute. Insurance contracts are contracts of adhesion, not negotiated contracts. *Glen Falls Ins. Co. v. Smith*, 217 W.Va. 213, 225, 617 S.E.2d 760, 772 (2005) (ñinsurance contracts are usually contracts of adhesion where the insured is not in the position to negotiate the terms of the policy with the insurer.ò). Further, in ordinary business contracts, one party does not have a statutory duty to disclose contract terms to the other party. *See e.g.* W. Va. Code §33-11-4(9)(n); 114 W.Va. C.S.R. 14-4.1. *Raucci*, is inapplicable to the Cumptansô claims because: (1) the Cumptansô claims involve an insurance policy, not a corporate sale; (2) the Cumptans did not sign nor negotiate the terms of the Allstate policy; (3) Allstate and the defendants were under a legal duty to accurately disclose the policy terms during the handling of the Cumptansô claims; and (4) the Cumptans have alleged that the defendants and Allstate concealed that they were acting inconsistently with internal Allstate policy.

Likewise, under *Sertz v. Gulf Oil Corp.*, 1988 WL 83188 (S.D. N.Y. July 22, 1988), another unpublished opinion relied upon by the defendants, the doctrine of fraudulent concealment is applicable ñwhere a defendant has fraudulently concealed the acts which have caused injury to the plaintiff or where the fraud which furnishes the basis of the action is self-concealing. *Sertz*, 1988 WL 83188, *3. Defendants and Allstate conspired to misrepresent and conceal pertinent policy provisions, provisions which they were required to disclose under West Virginia law. As such, the fraudulent concealment of the fact causing the Cumptansô injury ï the conspiracy between Allstate and the defendants to deny the Cumptans the ability to stack their underinsured motorist coverage in violation of Allstateôs internal documentation that its policy provisions did not preclude stacking ï was self-concealing. There was absolutely no way for the Cumptans to learn of Allstateôs and the defendantsô misrepresentations and violations of West Virginia law until they learned of the conspiracy.

A factual inquiry regarding the extent of the conspiracy between Allstate and the defendants to violate West Virginia law and deprive the Cumptans of their rightful policy benefits and when the Cumptans learned of their misconduct is necessary before it can be determined when the applicable statutes of limitation began to run. Accordingly, resolution of this issue is inappropriate until such time as the trier of fact has spoken.

Step 5 – Application of other tolling doctrines

Under *Dunn*, even if the trier of fact would determine that the Cumptans are not entitled to the benefit of the discovery rule or doctrine of fraudulent concealment, a determination of when the applicable statutes of limitation may expire cannot be made until such time as the trier of fact determines whether another tolling doctrine applies. Examples of other tolling doctrines include, the continuous representation doctrine, the continuous treatment doctrine and the continuous tort doctrine. *Dunn*, fn 7. The continuous tort doctrine is potentially applicable herein in light of the defendantsô and Allstateôs continued misconduct and concealment of applicable policy provisions. When the conspiracy to defraud policyholders, like the Cumptans, was first uncovered, Allstate could have attempted to make things right by going back and paying legitimate claims which it had previously denied but it did not. Instead, the conspiracy continued with respect to all previously denied claims. As such, the conspiracy to refuse to disclose pertinent policy provisions and to refuse to pay claims utilizing stacked coverage limits continues to this day. Because the misconduct continues, the running of the applicable statutes of limitation may not yet been triggered.

Application of the *Dunn* analysis makes clear that defendantsô motion to dismiss on statute of limitation grounds is improper. Questions relating to when all elements of the Cumptansôs causes of action occurred and whether the discovery rule, doctrine of fraudulent concealment and/or continuous tort doctrine apply all involve questions of fact inappropriate for resolution in a Rule 12(b)(6) motion. Further, to the extent any statute of limitation may be tolled as to Allstate, it is also tolled as to the defendants. *Dunn*, 689 S.E.2d at 273 (ñThe general rule is that if the statute of limitation is tolled as to one defendant in a civil conspiracy, it is tolled as to all alleged co-conspirators.ò) Therefore, the Cumptans respectfully request that defendantsô motion to dismiss on statute of limitation grounds be denied.

III. THE CUMPTANS' CLAIMS FOR COMMON LAW BAD FAITH ARE PROPERLY ASSERTED AGAINST THE DEFENDANTS DUE TO THE CIVIL CONSPRIACY ALLEGED BETWEEN THE DEFENDANTS AND ALLSTATE.

The allegations contained in the Complaint clearly indicate that the defendants and Allstate acted in concert to violate the law. In *Dunn*, the West Virginia Supreme Court of Appeals outlined the scope and effect of civil conspiracy claims in syllabus points 8 and 9, wherein the West Virginia Supreme Court of Appeals held:

> 8. A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.
>
> 9. A civil conspiracy is not a *per se,* stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s).

As explained in syllabus point 9 of *Dunn*, the defendants may be held liable for a tort, *i.e.* common law bad faith, where they conspired with Allstate for the commission of common law bad faith. *See also*, *Dunn*, 689 S.E.2d at 269 (ñA conspiracy may produce one or more torts. If it does, then every conspirator is liable for that tort, including a conspirator who promoted but did not commit the tort.ò (quoting *Segall v. Hurwitz*, 114 Wis.2d 471, 481, 339 N.W.2d 333, 338 (Wis. App., 1983)). Thus, defendants may be held liable for common law bad faith to the extent they conspired with Allstate in furtherance of Allstateôs commission of that tort.

The allegations of the Cumptansô complaint are adequate to maintain a claim for common law bad faith arising out of a civil conspiracy against the defendants. The allegations of the Complaint repeatedly reference and allege the common actions of the defendants and Allstate with respect to the handling of The Cumptansôs claim and the violation of West Virginia law. *See, e.g.,* ¶ 12 (ñDefendants Allstate, Larry D. Poynter and Ed Steen recognized that policy number 018153376 . . . did not include. . .ò); ¶ 14 (Defendants Allstate, Larry D. Poynter and Ed Steen fraudulently concealed from the Plaintiffs the existence of the available stacked . . .ò); ¶ 15 (ñThe Plaintiffs, to their detriment, relied on the representation of Defendants Allstate, Larry D. Poynter and Ed Steen . . .ò); ¶16 (ñBecause Allstate, Larry D. Poynter and Ed Steen fraudulently concealed the existence of stackable underinsured motorists bodily injury coverage benefits, . . ñ); ¶22 (ñThe acts and omissions of the Defendants as described in paragraphs 11 through 17 were not unique to . . . the claims of the Plaintiffs, Charles C. Cumptan and Deborah V. Cumptan. Rather, the Defendants were engaged in an intentional effort to conceal the availability of stacked underinsured motorist coverage benefits from all claimants presenting claims for such benefits.ò). The allegations contained in the Complaint clearly set forth the requisite elements of a civil conspiracy claim, relative to the tort of common law bad faith. Because defendants conspired with Allstate to commit the tort of common law bad faith, their motion to dismiss these claims is improper and should be denied.

IV. PLAINTIFFS HAVE ADEQUATELY PLED CLAIMS FOR FRAUD AND DECEIT AS TO THE DEFENDANTS IN LIGHT OF THE ALLEGATIONS THAT THEY ENGAGED IN A CIVIL CONSPIRACY WITH ALLSTATE.

As noted in the previous section, the Cumptans have pled a civil conspiracy between Allstate and the defendants. As such, defendants may be held liable for the actions of Allstate. Even in absence of the civil conspiracy claims, the defendants have notice of the basis of the claims for both fraud and deceit asserted against them both by virtue of the allegations of the Complaint and through the claim notes attached as Exhibit A thereto. Defendantsô reliance upon *Grennell v. Western Southern Life Ins. Co.*, 298 F.Supp.2d 390 (S.D. W.Va. 2004), and *Burns v. Western Southern Life Ins. Co.*, 298 F.Supp.2d 401 (S.D.W.Va. 2004), is somewhat misplaced. Both *Grennell* and *Burns* involved claims of reverse fraudulent joinder in an action filed by thousands of policyholders from various states. In those cases, the Southern District of West Virginia divided the cases among like plaintiffs and defendants and dismissed those claims where there was absolute no evidence or allegations of contact between specific plaintiffs and specific defendants. Here, the Cumptans have specifically alleged conduct by each of the defendants. Unlike *Grennel* and *Burns*, their Complaint does not include general claims asserted by hundreds of plaintiffs against the ñdefendantsò where there was no evidence that the defendants acted in a common manner. To the contrary, the evidence was that the alleged fraudulent representations were specifically tailored to each plaintiff based upon each plaintiffsô own financial circumstances. *Grennell,* 298 F.Supp. 2d 397-98. The court in *Grennell* indicated that its decision may have been different had similar representations been made to the various plaintiffs. The Cumptansô claims of fraud and deceit are properly plead against the defendants, particularly in light of the civil conspiracy allegations. Accordingly, defendantõs motion to dismiss should be denied.

CONCLUSION

Defendants engaged in a conspiracy with Allstate to defraud the Cumptans and violate West Virginia law. Defendantsô assertion that the Cumptansô claims should be dismissed under the ñtwo dismissal ruleò should be rejected because the claims asserted in the 1990 litigation are not substantially similar to those raised herein. To the extent there is any question as to whether the Cumptansô claims were timely filed, those questions are factual in nature and inappropriate for resolution in a motion to dismiss. Further, due to the conspiracy between defendants and Allstate, dismissal of The Cumptansô common law bad faith, fraud and deceit claim is inappropriate. WHEREFORE, for the reasons set forth above, plaintiffs Charles C. Cumptan and Deborah v. Cumptan respectfully request that defendantsô motion to dismiss be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Michelle Marinacci, Esquire, hereby certify that on this 27th day of October, 2010, I electronically filed the foregoing document *Plaintiffs' Memorandum in Opposition to Defendants Larry D. Poynter and Ed Steen's Amended Motion to Dismiss* with the Clerk of Court using CM/ECF which will send notification of such filing to the following:

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